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STEVEN F. KINZEL,
 Complainant,

v.

President, UNIVERSITY OF
 WISCONSIN SYSTEM (Extension),
 Respondent.

Case No. 92-0218-PC-ER

* * * * *

DECISION
AND
ORDER

The Commission has considered the objections of complainant filed in response to the proposed decision and order issued June 10, 1996, and consulted with the hearing examiner. The following comments address these objections filed by complainant on July 10, 1996.

Again complainant argues he was never advised in writing or orally that his performance was rated below average. Since this argument was addressed in the proposed decision, it will not be revisited except to observe the record shows that Dean Somersan employed the same means of communicating job performance concerns with all of her subordinates.

Regarding this same allegation of no notice of below average job performance, complainant argues he received merit increases and they are not awarded to an employee performing at a "needs improvement or below" level. The record shows that in academic years 1989, 1990 and 1991, complainant received a merit increase which, in each of those three years, was below the average increase rate for his division. Complainant testified he knew his merit increase in each of those years was below the average but never questioned this difference. Also, Dean Somersan testified that most increases were given as directed by the Board of Regents and some years the board mandated the giving of a specified percentage of merit increase across-the-board to all employees.

Complainant also argues that Dean Somersan had knowledge of his creed because of a statement in a document attached to Bette Hurley's August 5, 1991, grievance sent to the dean. This statement reads as follows: "[Complainant's] homophobic views and his fundamentalist religious beliefs were well known to [co-employees Barb Tensfeldt and Trisha Day]." Dean Somersan testified


that, prior to receiving this document, she knew nothing about complainant's religious beliefs and viewed this statement as an attempt by Hurley to "make her case," and the Commission has no reason to doubt Dean Somersan's testimony. Also, the record shows that Somersan supported complainant's decision to terminate Hurley; that she never talked to Day, Tensfeldt or anyone about complainant's religious beliefs; and, at the time of hearing, did not know complainant's creed. In fact, the record here does not specifically identify complainant's creed.

Finally, complainant argues that when Mary Britnall-Peterson resigned as district director, she did not move to a back-up position, but instead the dean created a specialist position for her, maintaining her salary at a half-time rate. This is partially accurate, but the circumstances and salary determinations in these two instances are not comparable. Unlike complainant, Peterson was not terminated from her administrative position but resigned her position to return to graduate school to seek a Ph.D. degree. As a consequence, the UWEX wanted to continue to have Peterson actively involved in UWEX programming and created a position which would allow her to do this. In contrast, the UWEX did not want complainant to continue to provide the services he had been providing and appointed him to a previously arranged back-up position. These two situations and personnel transactions are distinguishable and the guidelines governing the establishment of salary levels for each are not the same.

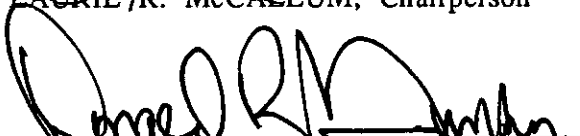
ORDER

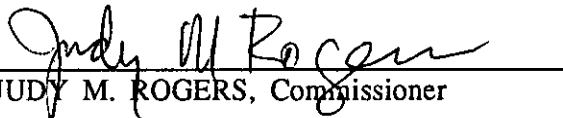
That the proposed decision as amended and supplemented herein, be adopted as the Commission's final decision and order.

Dated: August 21, 1996 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

DRM:rcr


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

Parties:

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NOTICE

OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's

order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.)

2/3/95

* * * * *

STEVEN F. KINZEL,

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President, UNIVERSITY OF
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Respondent.

Case No. 92-0218-PC-ER

* * * * *

PROPOSED
DECISION
AND
ORDER

This matter is before the Commission on a complaint of creed, sex, and sexual orientation discrimination regarding terms and conditions of employment and reduction of salary. To the extent any of the opinion constitutes a finding of fact, it is adopted as such.

FINDINGS OF FACT

1. Complainant Steven Kinzel was hired by University of Wisconsin Extension ("UWEX") on July 1, 1988. UWEX is one of fifteen institutions in the University of Wisconsin System ("UW System").
2. Complainant was appointed to a full-time, limited appointment, State 4-H Program Leader position in the Cooperative Extension Division, one of three divisions of UWEX.
3. As a limited appointee, under Ch. UWS 15, Wis. Adm. Code, complainant served at the pleasure of his appointing authority, the Dean of Cooperative Extension, UWEX, and could be terminated at will without right of appeal.
4. Complainant's general responsibilities as 4-H Program Leader were to provide statewide leadership to the 4-H Youth Development Program of UWEX.
5. In addition to the 4-H position, complainant was given a concurrent tenure appointment as Associate Professor in the UWEX Department of Youth Development, thereby providing a means of security in another position. Complainant never served in this back-up faculty appointment.

6. In September 1988, Ms. Aysa Somersan was appointed Dean of Cooperative Extension and became complainant's direct supervisor. Prior to that, complainant was supervised by Acting Dean Robert Rieck.

7. Dean Somersan performed job performance evaluations of complainant in 1989, 1990, and 1991. In 1989 complainant received a below average merit salary review. His merit increase of 3% was below the 3.75% average increase that year.

8. In 1990-91 the average salary increase was 4.25%. Complainant received a 2.5% increase in salary. The following year the average salary increase was 1.25%, and complainant received an increase in salary of 0.75%.

9. During this three-year period, complainant was rated below average in his job performance, and complainant never formally protested the amount of his merit salary increase awards.

10. In June 1991, complainant did not renew the employment contract of a subordinate, Bette Hurley. Hurley had been appointed under contract for the period of August 1, 1990 through June 30, 1991.

11. UWEX personnel rules and policies provide no right of appeal in such contract nonrenewals except on the basis of discrimination prohibited by law.

12. On August 5, 1991, Hurley filed a grievance with Dean Somersan alleging discrimination on the basis of sexual orientation.

13. By memorandum dated August 22, 1991, Somersan advised Hurley she had reviewed the matter, believed Hurley had not been discriminated against as alleged and affirmed the nonrenewal notice.

14. During this same period, on July 8, 1991, Somersan received a complaint from a staff member concerning the performance of complainant as 4-H Program Leader. Somersan began an investigation of the complaint. The investigation included interviews of 4-H youth state staff program leaders, district directors, and state agents throughout the state.

15. The Dean and Associate Dean, Gerald Campbell, discussed their findings from the interviews with complainant. Afterwards, by letter dated September 4, 1991, Somersan set goals for complainant to improve some of his weaknesses in management. Complainant was advised that his progress toward the goals would be reviewed in mid-January.

16. Also, on September 10, 1991, Somersan established a Faculty Advisory Committee to assist her in evaluating the 4-H youth state staff

organizational structure. Complainant was a presenter in one of the three meetings of this committee.

17. Complainant submitted three written interim reports on his progress to Somersan between October 1991 and January 1992. Somersan was generally pleased with the reports. She believed complainant was making an effort to improve in areas she had designated as deficient.

18. By January 23, 1992, Somersan had concluded new leadership was needed for the 4-H program. She met with complainant on this date and advised him of her decision.

19. By letter dated February 18, 1992, complainant's appointment as leader of the 4-H program was terminated, effective June 30, 1992, and he was offered to start his back-up appointment as a tenured associate professor in a specialist position on July 1, 1992.

20. Complainant was advised of his salary for his specialist position in a letter dated March 2, 1992, from Somersan. This salary level represented the average salary of UWEX associate professors with Ph.D degrees serving in a statewide capacity.

21. On April 17, 1992, complainant wrote UWEX Chancellor Patrick Boyle, taking exception to the new salary and lack of opportunity to negotiate the salary with him.

22. On April 22, 1992, Vicki Washington-Spruill issued a report on a discrimination complaint filed by Bette Hurley in August (see AA 10-13) with respondent's Affirmative Action Office. Washington-Spruill as administrator for civil rights compliance matters investigated the complaint. In her report, Washington-Spruill concluded Hurley's nonrenewal was based both on non-discriminatory reasons and those which could support a finding of discrimination.

23. On June 5, 1992, the UWEX chancellor wrote complainant, reaffirming complainant's new salary.

24. At some point, Hurley's complaint was settled, and the Washington-Spruill report was a consideration in making the settlement, but the report never changed Dean Somersan's view as to the Hurley non-renewal decision.

CONCLUSIONS OF LAW

1. This matter is before the Commission under §230.45(1)(b), Wis. Stats.
2. Complainant has the burden to show he was discriminated against by respondent on the basis of creed, sex, and sexual orientation, in violation of the Wisconsin Fair Employment Act.
3. Complainant has failed to sustain his burden of proof.
4. Complainant was not discriminated against by respondent as alleged.

OPINION

In discrimination cases the Commission has consistently employed the method of legal analysis established in McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 5 FEP Cases 965 (1973). Accordingly, complainant must establish a prima facie case of discrimination. Upon establishing a prima facie case, respondent must move forward by articulating a non-discriminatory reason for its alleged discriminatory action. After respondent provides its non-discriminatory reason for its actions, complainant must prove respondent's articulated reason is a pretext for unlawful discrimination as defined by law.

To establish a prima facie case of discrimination, complainant must show (a) he was a member of a protected class, (b) he suffered an adverse employment action, and (c) he was treated differently from non-protected class members, or there are other facts which give rise to an inference of discrimination.

Here, complainant contends respondent discriminated against him on the basis of creed, sex, and sexual orientation, when he was removed from his position as State 4-H Program Leader and subsequently had his salary reduced, in violation of the Wisconsin Fair Employment Act, particularly §§111.321, 111.337, and 111.36, Wis. Stats.

I. Creed and Sexual Orientation Discrimination

Complainant claims he was removed from his position as State 4-H Program Leader because of his creed, sex, and sexual orientation. He argues that Dean Somersan placed him on a performance plan about one month after she received a charge of discrimination against him from Bette Hurley, in

which Hurley accused him of belonging to a religion which renounced homosexual persons, and alleging that he discriminated against her due to her sexual orientation. As evidence of creed and sexual orientation discrimination, complainant states: "[A]lthough Dean Somersan allegedly supported Mr. Kinzel with regard to his decision involving Bette Hurley, she apparently approved the payment of money to Ms. Hurley to settle her alleged claim against Mr. Kinzel and the respondent." Complainant argues this action by Somersan supports an inference that a determining factor in Somersan's decision in January 1992 to remove him from his 4-H leadership position was based on his creed and sexual orientation.

The greater weight of credible evidence presented does not support the claim of creed and sexual orientation discrimination. First, it is doubtful complainant established a prima facie case. Dean Somersan testified she did not know or discuss complainant's creed or sexual orientation when she decided to terminate his limited appointment as 4-H Program Leader. Complainant testified that during his investigatory interview with Washington-Spruill, he told her he attended a church that disapproved of the gay/lesbian life style. But Washington-Spruill testified she questioned whether complainant discriminated against Hurley on the basis of sexual orientation and that she had no communication with the dean during the course of her investigation. Also Washington-Spruill testified she did not in any way participate in the decisions to remove complainant from his limited-term position or set his salary. Complainant failed to establish a link between his claim of creed and sexual orientation and Dean Somersan.

But, regardless of whether complainant established a prima facie case, respondent presented evidence establishing that Somersan's initial concerns about complainant's managerial abilities were heightened by a complaint on July 8, 1991, from a male colleague of the complainant. This complaint caused Somersan, with Associate Dean Gerald Campbell, to interview all 4-H state staff members and others throughout the state associated with the program and establish a program through which complainant could improve his managerial skills. Finally, Somersan terminated complainant after concluding complainant's leadership was not meeting program needs. This evidence rebuts any prima facie case of discrimination that complainant may have established.

Under the claim that respondent's explanation for its action was pretextual, complainant argues he understood merit increase as being indicative of a

good job performance notice and that Somersan never provided him with any written performance evaluations.

This argument fails. It skirts respondent's explanation for terminating him. Rather, than refuting respondent's reason for his termination, complainant says he was provided no specific documentation of his poor job performance. While this assertion may have some merit, more overwhelming evidence shows that Dean Somersan expressed her concerns about complainant's leadership problems with him through discussions and meetings, keeping complainant apprised of her approach to solving the problem, and her subsequent findings. Although complainant was not given written documentation, clearly Dean Somersan informed complainant of her concerns regarding his leadership and continued to do so through the evaluating process which led to his termination as 4-H Program Leader.

Finally, if we accept complainant's assertion that Dean Somersan terminated him because she believed he acted in violation of the Fair Employment Act when he non-renewed Hurley, because of Hurley's sexual orientation, then complainant's creed or sexual orientation was not at issue, but rather complainant's bias against Hurley's sexual orientation. Clearly, complainant's creed or sexual orientation was never at issue, nor was it ever known by Dean Somersan.

Also, for the same reason, complainant's assertion that respondent reduced his salary significantly because of his creed and sexual orientation does not stand. Complainant presented no direct evidentiary link between his discrimination claim and respondent's act.

II. Sex Discrimination

Complainant argues that two female UWEX administrators, Mary Britnall Peterson and Jane Voichick, were treated more favorably than he when their salaries were adjusted after leaving administrative positions and shifting to back-up positions, but the evidence presented renders such comparison untenable. The evidence shows that prior to serving as a 4-H program leader for UWEX, Voichick was a full professor at the University of Wisconsin-Madison. When Voichick left her position at UWEX, she returned to her academic position at UW-Madison, and UWEX had no input in the computation of Voichick's salary. However, Voichick did maintain some duties at UWEX as a specialist, and some portion of sums paid to UW-Madison by UWEX through

contracts for services from Voichick's department could have been used to pay some percentage of her salary.

Dean Somersan's uncontroverted testimony was that Mary Britnall Peterson worked under her supervision as a UWEX Southeast District Director, that she resigned to pursue a Ph.D program, and that a half-time state specialist position was created for her. Peterson did not return to her back-up position, which was a county position. The county funded 40% of that position, and the remaining 60% came from state and federal funds.

It is clear these instances of salary determinations involve circumstances distinctly different from those of the complainant. Voichick's salary for her back-up position, unlike complainant's salary, was not determined by UWEX, and Peterson, unlike complainant, never returned to her back-up position, but was given a part-time position. So, while complainant may have established a prima facie case of sex discrimination regarding his back-up position salary, the evidence presented does not support a conclusion of sex discrimination.

ORDER

Complainant's claims of creed, sex, and sexual orientation discrimination when respondent removed him from the position of State 4-H Program Leader and reduced his salary are dismissed.

Dated: _____, 1996 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DRM:rcr

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

Parties:

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